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IN THE
SUPREME COURT FOR THE UNITED STATES

October Term 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
BRIEF FOR RESPONDENT STATE OF MICHIGAN

FRANK J. KELLEY
Attorney General for the
State of Michigan

Robert A. Derengoski
Solicitor General

Stewart H. Freeman
Thomas J. Emery
Assistant Attorneys General

Business Address:
The Law Building
525 West Ottawa
Lansing, MI 48913
(517) 373-1124

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QUESTIONS PRESENTED

A. WHETHER THE FEDERAL COMMON LAW OF NUISANCE PROVIDES A NECESSARY AND VIABLE REMEDY FOR INTERSTATE WATER POLLUTION DISPUTES?

1. WHETHER THE FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED IN 1972 AND 1977 PRESERVES STATES RIGHTS TO APPLY MORE STRINGENT EFFLUENT LIMITS WHERE GENERAL LIMITS ARE INADEQUATE?

2. WHETHER CONGRESS INTENDED THE PASSAGE OF THE FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED, TO EFFECT A PRE-EMPTION OF THE FEDERAL COMMON LAW OF NUISANCE AS A REMEDY FOR INTERSTATE WATER POLLUTION?

3. WHETHER THE JUDICIAL DOCTRINE OF PRIMARY JURISDICTION BARS FEDERAL COMMON LAW ACTIONS IN THE FEDERAL DISTRICT COURTS?

B. WHETHER APPLICATION OF THE PREPONDERANCE OF THE EVIDENCE STANDARD OF PROOF TO THE FACTS AND CIRCUMSTANCES OF THIS CASE IS IN ACCORDANCE WITH PRIOR DECISIONS OF THIS COURT.

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PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

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BRIEF FOR RESPONDENT STATE OF MICHIGAN

The Opinions Below, Jurisdiction, and Statutory Provision Involved sections of Brief of Petitioners are satisfactory to Respondent, State of Michigan.

STATEMENT OF THE CASE

The State of Michigan (hereinafter 'Michigan') includes this complete statement of the case rather than rely upon or merely correct inaccuracies in the statement contained in petitioners brief. Petitioners' statement of the case fails to set out all the facts that are material to the questions presented. Rather it consists primarily of argument.

This case had its origin in the Supreme Court decision in *Illinois* v. *Milwaukee*, 406 US 91 (1972). In that case the State

of Illinois sought leave to file a complaint based on the Supreme Court's original jurisdiction against four cities and two local sewerage commissions of the State of Wisconsin. Illinois alleged that these municipalities were polluting Lake Michigan, an interstate body of water, by the discharge of raw or inadequately treated human sewage, and sought the abatement of the alleged public nuisance. This Court denied the motion for leave to file under the Court's original jurisdiction without prejudice to the right of the State of Illinois to file an action under 28 USC §1331 in an appropriate United States District Court. This Court indicated that such an action could be premised upon the federal common law of nuisance.

On May 19, 1972, shortly after the Supreme Court's decision, the State of Illinois commenced the present action in the United States District Court for the Northern District of Illinois. The State of Michigan was granted leave to intervene as a party plaintiff on November 21, 1972.

In October 1972, Congress enacted PL 92-500; 33 USC 1251, et seq the Federal Water Pollution Control Act Amendments of 1972 (the "Act" or "FWPCA"). That enactment —made substantial changes to the language of the Federal Water Pollution Control Act, Act June 30, 1948, C748 which was amended numerous times through early 1972; Sec 33 USC §466 et seq, 33 USC §1157 et seq. For purposes of this case, however, the pertinent amendments are those which occurred in October 1972.

In December 1977, Congress further amended the FWPCA through passage of PL 95-217. In Michigan's view these amendments have little effect on the portions of the FWPCA pertinent to this action. Subsequent to service of the complaints, Milwaukee moved to dismiss the action on the ground that the trial court lacked personal jurisdiction, and that venue of the action did not properly lie in the Northern District of

Illlinois. The District Court denied these motions. *Illinois* v. *Milwaukee,* 4 E.R.C. 1849 (N.D. Ill. 1972) (App.). Milwaukee then moved to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. This motion was also denied. *Illinois* v. *Milwaukee,* 366 F. Supp. 298 (N.D. Ill. 1978). This action was brought against the cities of Milwaukee, Kenosha, Racine and South Milwaukee and the Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee. Negotiated agreements with the cities of Kenosha, Racine and South Milwaukee were completed prior to the trial. Thereafter, those municipalities did not take an active role in the proceedings.

Trial commenced on January 11, 1977. During the ensuing six months over 14,000 pages of transcript were produced, and hundreds of exhibits entered into evidence. The testimony covered highly technical subject matter and involved extensive use of expert testimony to present scientific facts and theories in such fields as limnology, oceanography and virology, as well as engineering concepts.

The thrust of the State of Michigan's allegations were that discharges of raw or inadequately treated sewage from petitioners' wastewater treatment facilities or directly from sewers during combined sewer overflows (CSO) contributed excessive nutrients, primarily phosphorus, to Lake Michigan. Such discharges were alleged to be contributing to the "cultural" or "accelerated" eutrophication (aging) of Lake Michigan.[1] These allegations coincided with similar allegations by the State of Illinois.

In fact the testimony at trial established that the nutrient,

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[1] Eutrophication refers to the increase in nutrient concentration in a body of water and the consequent increase in biological activity, including growth of algae and other organisms. Appendix to Petition for Certiorari B-26. Future citation to petition for certiorari will read as "A. Pet."

phosphorus, is a component of sewage treatment plant discharges (T-12561, 12685) and that sewage treatment plant discharges contribute to "accelerated" eutrophication of lakes into which it is discharged (T-3249). Sewage discharges carry many of the essential elements for plant growth; (T-3254; 2889). Petitioners are the source of an annual phosphorus discharge in excess of 1,000,000 pounds. (Tr. 12929). Phosphorus is one of the key nutrients to increased growth of plant life in Lake Michigan because it is a limiting nutrient (T-3254). Excessive and unlimited growth of such plants leads to development of a scummy or soupy appearance to the entire water column (T-3307) and the shoreline (T-3321), depletion of oxygen in the bottom layers of water; (T-3311, T-3321) and potential taste and odor problems in drinking water taken from the lake (T-3279). Lake Michigan is a major source of drinking water for the inhabitants of the Lake Michigan basin. Further, it is a major recreational attraction.

Based upon the evidence presented the Trial Court made specific findings that "cultural" or "accelerated" eutrophication was occurring in Lake Michigan. Further it found that Petitioners discharges of phosphorus and other nutrients in raw or inadequately treated sewage was a significant cause of this accelerated aging process or eutrophication of Lake Michigan.

> "I find that as a result of the inputs of phosphorus and other nutrients to Lake Michigan, the lake is undergoing accelerated eutrophication. Accelerated eutrophication is that eutrophication which is caused by man, as opposed to the eutrophication which occurs inevitably and naturally." (A. Pet. F-16)
>
> • • •
>
> "Accelerated eutrophication results in taste and odor problems in the lake water. In an advanced state, this

odor problem can affect the use of the water for recreational purposes, and even in a less advanced stage, it can cause problems with drinking water." (A. Pet. F-16)

• • •

"In addition to the odor and taste problems caused by eutrophication, there is a loss of the clarity of the water, which is an aesthetic value important to many people, and I think rightly so. A secchi disc in Lake Superior can be seen at a depth of 60 feet. In Lake Michigan it can be seen at a depth of 10 to 15 feet only. Lake Superior is an ologotrophic lake. Lake Michigan is becoming a lake which exhibits the turbidity typical of lakes inhabited by increasing populations of algae." (A. Pet. F-17).

"The accelerated eutrophication caused by these nutrient inputs is far greater in the in-shore zone than it is in the off-shore zone, but there is no reason to believe that the eutrophication found in the in-shore zone will not spread, and, if not stopped, that it will not spread clear across the lake. That is the way it happened in Lake Erie." (A. Pet. F-17)

• • •

"I find that the waters of Lake Michigan within the territorial boundaries of the State of Illinois are undergoing a process of accelerated eutrophication at the present time and that this process is caused by nutrient inputs, some of which emanate from the defendants. As has been pointed out by everyone in this case, there is no method of identifying any particular molecule of phosphorus or nitrogen or any other chemical as having come from a particular location. But because the waters of the in-shore zone interchange with each other and do mix longitudinally along the shore, it is a fact, both inferrable circumstantially and deducible as a matter of logic, that all input of nutri-

ents along the western shore contribute to the accelerated eutrophication of the entire western shore line." (A. Pet. F-17)

• • •

"Because of the interchange of water between the in-shore zone and the off-shore zone and the eventual mixing of the entire lake, the State of Michigan is exposed to injury and is being injured by the discharges of nutrients by these defendants." (A. Pet. F-18)

• • •

"In any event, I believe that one million pounds of phosphorus from the treatment plants alone, without considering additional phosphorus discharged by the overflows, is a significant input to the lake, and its removal would be significant removal. We know that Milwaukee is the biggest point source on the lake and that, of the total point sources on the lake, the Milwaukee discharges constitute a substantial percentage." (A. Pet. F-20)

The trial court then summarized the totality of the evidence with the following determinations based on the facts in evidence:

"I find from what I believe is clear and convincing evidence that the defendants' sewage discharges into Lake Michigan are presently contributing in a substantial way to the accelerated eutrophication of the in-shore zone of the western shore of Lake Michigan, including waters of Lake Michigan which are within the territorial boundaries of the State of Illinois." (A. Pet. F-22)

• • •

"I find further, on the basis of clear and convincing evidence, that due to the interchange of waters in the

> in-shore and off-shore zones, the defendant's discharges, if continued at anything like present levels, will substantially contribute to the accelerated eutrophication of Lake Michigan as a whole, including waters within the territorial boundaries of the States of Illinois and Michigan." (A. Pet. F-23)

As a result of these findings the Court imposed a limitation on the concentration of phosphorus that petitioners may discharge from their sewage treatment facilities. That limitation is set at a concentration no more that one (1) miligram per liter (1 mg/1) based on a monthly average. (A-361). The Seventh Circuit affirmed the district court order insofar as it imposed this particular effluent limitation for phosphorus discharges.

SUMMARY OF ARGUMENT

A. This Court specifically recognized the Federal Common Law of nuisance as a remedy for interstate pollution problems in *Illinois* v. *City of Milwaukee*, 406 U.S. 91, (1972). Although the Federal Water Pollution Control Act was amended comprehensively since that decision the Act contains clear congressional intent to preserve the federal common law remedies. Sections 505(e) of the Act, 33 USC 1365(e) enunciates the intent to preserve all existing remedies. Section 511, 33 USC 1371 preserves the authority of Federal officers or agencies and may be applied to include Federal Courts. Thus, federal common law of nuisance actions may be heard in federal courts. The imposition of more stringent limits than generally applicable is specifically authorized by Sections 301, 33 USC 1311 and Section 510; 33 USC 1370 of the Act.

B. In order to pre-empt the common law through enactment of a federal statutory scheme Congress must clearly manifest intent to cause such pre-emption. In this case, Con-

gress has not only failed to manifest intent to pre-empt the federal common law of nuisance, but, it has in fact indicated an opposite intent, i.e. the preservation of common law remedies.

C. The doctrine of "primary jurisdiction" is not applicable to this case to oust the federal district court of jurisdiction. Where a statute contains a savings clause preserving common law rights the doctrine need not be applied unless failure to do so would cause irreconciable conflict between the statutory scheme and the preserved common law remedies *Nader* v. *Allegheny Airlines*, 426 US 290, (1976). The FWPCA preserves common law remedies. Application of and compliance with the Court-imposed phosphorus limitation is not inconsistent or in conflict with Petitioners State of Wisconsin issued National Pollutant Discharge Elimination System (NPDES) permit requirements.

D. The "preponderance of the evidence" standard of proof applied by the Trial Court in this case was the appropriate standard and is in accord with the decisions of this Court. The "preponderance of the evidence" test is the widely applied standard for nuisance actions of common law. This Court has applied it where interstate pollution cases are involved. *Georgia* v. *Tennessee Copper*, 206 US 230 (1907).

The "clear and convincing" standard, on the other hand, is generally applied where the interstate dispute concerns two states. *Ohio* v. *Wyandotte Chemical Corp.*, 401 US 493 (1971). This Court has applied the "clear and convincing" standard in part in order to give recognition to the State's status as a sovereign. Such status is not applicable to the petitioners in this case. Thus, the rationale for application of the "clear and convincing" standard is inapplicable, as well.

E. The Petitioners are the major contributors of point source sewage discharges to Lake Michigan. Sewage discharges contain excessive concentrations of the nutrient phosphorus. Such discharges are a major cause of the accelerated eutrophication (aging) of Lake Michigan.

ARGUMENT

A. THE FEDERAL COMMON LAW OF NUISANCE PROVIDES A NECESSARY AND VIABLE REMEDY FOR INTERSTATE WATER POLLUTION DISPUTES.

This Court recognized the federal common law of nuisance as a remedy for interstate water pollution problems in *Illinois* v. *Milwaukee*, 406 US 91 (1972). Petitioners (hereafter 'Commissions') appear to argue that in light of the passage of the Federal Water Pollution Control Act amendments of 1972 and 1977, (hereafter 'FWPCA' or 'the act') the federal common law of nuisance is no longer a necessary or appropriate remedy for interstate water pollution disputes. Their arguments seem based both on the claim of congressional pre-emption of the subject matter by comprehensive legislation, i.e. the FWPCA, and the doctrine of "primary jurisdiction" by which courts should defer to administrative determinations under the FWPCA.

Respondent, State of Michigan (hereafter 'Michigan') submits that the Commissions' arguments, however grounded, do not comport with either congressional intent or with prior decisions of this Court. Just as significantly, Michigan submits that despite passage of the amended FWPCA subsequent to *Illinois* v. *Milwaukee* supra, the federal common law continues to be a necessary and appropriate remedy for interstate water pollution problems, supplemental to the legislative scheme of the FWPCA.

1. THE FWPCA PROVIDES FOR STATE APPLICATION OF MORE STRINGENT EFFLUENT LIMITATIONS ON POINT SOURCE DISCHARGES WHERE GENERAL LIMITS ARE INADEQUATE.

The plain language of the FWPCA demonstrates congressional intent to provide broad state authority to deal with specific water pollution problems not adequately addressed by the general minimum effluent limits imposed under the Act. Section 101; 33 USC 1251 sets forth the following broad declaration of goals:

> "Sec. 101(a) The objective of this act is to restore and maintain the chemical, physical and biological integrity of the nation's water . . ."
>
> "(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of *states to prevent, reduce and eliminate pollution,* to plan the development and use . . . of the land and water resources. . . ." (Emphasis supplied).

The above-quoted language indicates congressional intent to provide within the framework of the FWPCA a broad scope of activity for states in combatting pollution problems. This language was included in the 1972 amendments. It remains exactly the same following the 1977 amendments. Significantly, Congress did not make any change in the language or the policy which it reflects.

Section 301(b)(1)(B) of the FWPCA; 33 USC 1311(b)(1)(B); provides that the administrator of the United States Environmental Protection Agency (hereafter USEPA) will establish effluent limitations for publicly-owned wastewater treatment works. These limits are of a general nature and prescribe the minimum level of regulation. For example, municipal

wastewater treatment facilities were to have achieved a minimum of secondary treatment not later than July 1, 1977. The USEPA has, by regulation, imposed secondary treatment discharge limitations of 30 miligrams per liter (mg/1) biological oxygen demand (BOD) and 30 mg/1 total suspended solids (TSS)[2]. However, this established limitation need not set an absolute uniform discharge limit for all circumstances. Subparagraph (C) of §301(b)(1); 33 USC 1311(b)(1)(C) provides that a state may establish *any* more stringent limitations, including those necessary to meet water quality standards, whenever deemed necessary by that state. The pertinent provision reads in part as follows:

> "(b) In order to carry out the objective of this chapter there shall be achieved—
>
> • • •
>
> "(1) (C) not later than July 1, 1977, any more stringent limitation including those necessary to meet water quality standards, treatment standards, or schedule of compliance, *established pursuant to any state law or regulation, (under authority preserved by section 510)* or *any other federal law* or regulation or required to implement any applicable water quality standard established pursuant to this act." (Emphasis supplied).

Clearly under the FWPCA, states maintain authority to develop and enforce more stringent limitations than those required under §301; 33 USC 1311. The USEPA limit is not intended to be the exclusive and ultimate limit; states may set and impose more stringent limits.

Section 510 of the FWPCA; 33 USC 1370, dovetails neatly with §301(b)(1)(C); 33 USC 1311(b)(1)(C) to clearly set

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[2] See 40 CFR §133.102.

forth congressional intent that states retain broad authority to apply more stringent effluent limitations to point source dischargers than provided for in the federal statute. That section provides in part:

> "Sec. 510. Except as expressly provided in this act, nothing in this act shall (1) preclude or deny the right of any state or political subdivision thereof . . . to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation . . . is in effect under this act, such state or political subdivision . . . may not adopt or enforce any effluent limitation, . . . which is less stringent than the effluent limitation . . . under this act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the state with respect to the waters (including boundary waters) or such states."

The states are clearly empowered by Congress to implement and apply more stringent limitations (but not less stringent) on discharges. In fact the State of Michigan has imposed more restrictive limits on the effluent of municipal wastewater treatment facilities in several Lake Michigan basin communities[3]. Nor do the FWPCA sections discussed thus far indicate any congressional limitation on States' use of appropriate judicial forums. In fact, the explicit preservation of rights contained in proviso number 2 in the above quoted Section 510 of the FWPCA seems a clear indication that state remedies for pollution of interstate waters, including federal common law nuisance claims, are to remain viable options in

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[3] State issued NPDES Permit No. MI 0026069 limits the City of Grand Rapids sewage treatment facility to a discharge of 10 mg/l BOD and 15 mg/l suspended solids calculated on a 30 day average. State issued NPDES Permit No. MI 0023108 imposes similar limits on the City of Holland sewage treatment facility.

the abatement of water pollution problems. By way of example, in a recent Federal action the State of Michigan has compelled a municipality to comply with the provisions of a state issued discharge permit which requires elimination of combined sewer overflows.[4]

Reference to the Legislative history of the FWPCA rather pointedly confirms that Congress intended to preserve the rights of states to apply more stringent discharge limitations. The following colloguy involving the chief senate sponsor of the Act is illustrative:

> "Mr. Nelson.—May I ask one question: Is there anything in the bill that would prohibit any State from establishing any water quality standard higher than the standards established under this act?
>
> Mr. Muskie. I say to the Senator that I wanted to check with the staff to be sure I was correct that the States' rights are fully protected.
>
> Mr. Nelson. They may have a higher standard?
>
> Mr. Muskie. That is correct."
>
> 1 Legislative History of the Water Pollution Control Act Amendments of 1972 p. 206. (Hereafter 'Legislative History').

With respect to the authority preserved by Section 510; 33 USC 1370 the Congressional Conference Report stated:

> "Section 510 provides that States, political subdivisions, and interstate agencies retain the right to set more restrictive standards and limitations than those imposed under this Act."

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[4] State of Michigan, et al v. City of Allen Park, Fed. District Court, Eastern District of Michigan File No. 79-74681.

1 Legislative history 331.

This Court has given recognition to the right of States to establish more stringent discharge limitations than those general limitations applied under the federal authority of the Act. In *EPA* v. *California,* 426 US 200; (1975) this Court generally reviewed the impact of the 1972 amendments to the FWPCA on water pollution regulation, enforcement and abatement. This Court specifically recognized in *EPA* v. *California,* supra p 204, 220, a States' right to set more stringent limitations in appropriate circumstances and further indicated that under proper conditions the USEPA is obligated to include such more stringent limits established by States in permits it issues. Accord,: *U.S. Steel* v. *Train,* 556 F2d 822 (7th Cir 1977); *Mianus River Committee* v. *EPA,* 541 F2d 899 (2d Cir. 1976).

2. THE FWPCA AS AMENDED IN 1972 AND 1977 PRESERVES COMMON LAW RIGHTS AND REMEDIES INCLUDING FEDERAL COMMON LAW NUISANCE ACTIONS BY STATES TO ABATE INTERSTATE WATER POLLUTION.

Congress, by enactment of the FWPCA, has established a comprehensive and detailed plan for nationwide water pollution control. Just as clearly, however, as discussed in Section A hereof, the effluent limits and other control measures imposed under the Act do not preclude State imposition of more stringent limitations. *Section 510; 33 USC 1370,* supra. These preserved States' rights read together with the Congressional statement in Section 511(a)(1); 33 USC §1371(a)(1) that nothing in the Act "shall be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent" with the Act, suggests that federal courts retain their jurisdiction to hear actions under the federal common law of nuisance. Such actions may be brought to apply more stringent limita-

tions to particular discharges based upon the specific factual situation. Application of more stringent limitations, through a federal court where necessary, would be in accordance with the proper "authority" of an "officer of the United States under other [federal] law," i.e. federal common law of nuisance. The application of more stringent limits is certainly not inconsistent with the purposes and intent of the Act.

A further significant indication of Congressional intent to preserve the role of the courts and federal common law claims is found in the "citizen suit" provisions of the Act, Section 505; 33 USC 1365. Section 505(a) establishes the cause of action on behalf of private citizens. Section 505(b), (c) and (d) specify certain notice, venue and other factors applicable to such suits. The key provision of that section for purposes of this case is Section 505(e), which reads as follows:

> "(e) Nothing in this section shall restrict any right which any person (or class of persons) may have *under* any *statute or common law* to seek enforcement of any effluent standard or limitation or *to seek any other relief* (including relief against the administrator or a state agency)." (Emphasis supplied).

Under Section 505(a) Congress specifically provided for a greater access to the courts for 'citizens' as defined in section 505(g). The purpose of such actions was to facilitate enforcement of effluent limits and administrative orders and further to provide a means of ensuring governmental compliance with duties imposed by the Act. Then Section 505(e) indicates that by providing for these 'citizens suits' under 505(a) other rights to bring actions were not displaced. See *Natural Resources Defense Council* v. *Train* 510 F2d 692 (D.C. Cir 1975) dealing with the inter-relationship of Sections 505(a), (b) and (e) and their impact on Federal Court jurisdiction under 28 USC §1331 and the Administrative Procedures Act, 5 USC

§§701-706. The former matter is of particular pertinence. The D.C. Circuit determined that it must look to the legislative history to establish the relationship of the subsections mentioned. First, the D.C. Circuit referred to the legislative history of the Clean Air Act Amendments which preceded and were the model for smilar provision in the FWPCA. It determined that:

> "The legislative history of the Clean Air Act Amendments reveals that the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the act would be implemented and enforced." (510 F2d 692, 700).

It also determined that the same intent of Congress was exhibited in the FWPCA amendments of 1972. Consequently, the court concluded as follows:

> "The limitations, in subsections (a) and (b) of §505, restrict the expansion of jurisdiction provided by the special citizen suits provision of §505(a), and do not cut back on federal court jurisdiction over actions that would have been maintainable even in the absence of that special authorization. This intent is confirmed by the savings clause of subsection (e)." (510 F2d 692, 702).

The Second Circuit made a similar analysis regarding the citizen suit provisions and specific effect of §505(e) of the FWPCA. Both *Conservation Society of Southern Vermont* v. *Secretary of Transportation,* 508 F2d 927 (2d Cir. 1974) and *Natural Resources Defense Council* v. *Callaway,* 524 F2d 79 (2d Cir. 1975), are in accord with *NRDC* v. *Train, supra.*

The same analysis applied to Section 505(e) supports continued federal court jurisdiction of federal common law ac-

tions. In *Illinois* v. *Milwaukee, supra,* p. 8, this Court provided that federal common law actions should be brought under 33 USC §1331. Nor is there anything in Section 505(e) that suggests that it only applies to state common law actions and excludes those under federal common law.

Significantly, when the FWPCA was amended in 1977 following the above line of cases, the 'citizen suit' provisions remained unchanged. Congress showed no inclination to alter the broad role courts would play in effectuating the purposes of the Act.

Even though Congress provided a comprehensive water pollution control scheme through passage of the FWPCA, it also preserved and fostered a broad role for the courts as well. Through actions under the federal common law of nuisance the courts may play an important role in implementing the purposes of the Act.

3. CONGRESS DID NOT INTEND PASSAGE OF THE FWPCA TO PRE-EMPT THE FEDERAL COMMON LAW OF NUISANCE AS A REMEDY FOR INTERSTATE WATER POLLUTION.

Whether a federal statutory scheme results in a pre-emption of common law depends upon congressional intent. The purpose of Congress is the ultimate touchstone. *Malone* v. *White Motor Corp.* 435 US 497 (1978); *Ray* v. *Atlantic Richfield Co.* 435 US 151 (1978). Here there is no evidence that Congress intended the common law remedies already in existence to be pre-empted. In fact, as discussed in part I, A and B of this brief the contrary intent is clearly evident.

This court has also grounded a determination of pre-emption of other law upon a finding of conflict between it and federal law. A conflict will be found where compliance with both

federal and state regulations is a physical impossibility. *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 US 132 (1963). There is no evidence that compliance with the court order in this case will cause Petitioners compliance with their NPDES permit or any other applicable portion of the Act or regulations to be a 'physical impossibility'. The court ordered a limit upon discharge of the nutrient phosphorus from the Petitioners sewage treatment plants is identical to their state imposed NPDES permit limitation on phosphorus discharges.

Petitioners purport to find support for their position that the FWPCA and the effluent limitations promulgated thereunder by the USEPA are the sole limitation that may be placed upon municipal wastewater discharges in *Committee For The Consideration of the Jones Fall Sewage System* v. *Train,* 539 F2d 1006 (4th cir 1976). However, careful reading of the *Jones Falls* case shows that Petitioners' reliance upon that case is misplaced. In the *Jones Falls* case, the court was very careful to point out that the complainant therein was not a state nor was there an allegation of interstate harm. The ruling was based squarely on the fact that the alleged pollution was *intrastate,* i.e. 'local' in nature according to the court's analysis. On that basis alone, and without regard to the merits of the Court of Appeals decision in that case, it is distinguishable from the case at bar.

Two other facets of the *Jones Falls* case should be noted. First, under the facts of the case the fourth circuit acknowledged that State courts could apply State common law more rigidly to the discharges at issue. Second, had the facts that exist in the case at bar been present, i.e. state complainant and interstate pollution the fourth circuit undoubtedly would have recognized the application of the Federal common law of Nuisance.

The following quotation from the *Jones Falls* case, is of pertinence:

> "We may thus take it as established that there is a body of federal common law by which a public nuisance in one state which infringes upon the environmental and ecological rights of another state may be abated. As thus applied, there is an acceptable accommodation of state and national interest [footnote omitted]. Too, as the Supreme Court observed in *Illinois* v. *Milwaukee*, there is much federal interest in interstate and navigable waters. Yet, the statute was largely designed to enlist the aid of the states and, through state action, to achieve the final objective of purity of waters . . ."

Actually, then, the *Jones Falls* case provides support for the continued viability of the federal common law of nuisance, at least as applied to the circumstances of this case.

4. THE DOCTRINE OF PRIMARY JURISDICTION DOES NOT APPLY TO BAR FEDERAL COMMON LAW ACTIONS UNDER THE FWPCA.

Petitioners raise this argument in several places in their brief, (pp 17, 18 and 31). They claim that the court should have deferred to the "expert administrative agency." The doctrine of primary jurisdiction is concerned with promoting the proper relationships between courts and administrative agencies. *Nader* v. *Allegheny Airlines, Inc.* 426 US 290 (1976); *United States* v. *Western Pacific R. Co.* 352 US 59 (1956). Where a statute contains a savings clause regarding common law rights the doctrine need not be applied except where failure of the court to defer would cause irreconcilable conflict between the statutory scheme and the preserved common law remedies. *Nader* v. *Allegheny Airlines* and *U.S.* v. *Western Pac. R. Co., supra.*

Application of federal common law remedies pursuant to section 505(e) of the FWPCA does not create a situation of irreconcilable conflict as referred to in prior cases. Compliance with the 1 mg/1 monthly phosphorus discharge limit of lower court order entered here will not conflict with or prevent compliance with the State of Wisconsin's NPDES permit limit of 1 mg/1 discharge monthly average.

With respect to Petitioners' claims that the Courts should defer to the "expert administrative agency", congressional intent appears just the opposite. The legislative history indicates congressional recognition of a broader role for the courts. The following comments as illustrative:

> "There can be little question based on the increasing number of public works projects which are being litigated that individual citizens and environmental groups have turned and are continuing to turn to legal action as a remedy for what they consider to be errors on the part of the Government. They are no longer willing to rely on the administrative process to work but instead have taken the initiative in having the forum for decision-making be in the court room.
>
> The Committee appreciates the growing citizen awareness of their rights to utilize the courts.
>
> However, the Committee is also concerned that this movement to the courts may have been brought about by inadequate recognition on the part of the administrative agencies as to the proper role of the public . . . It is with the understanding that steps are necessary to restore the public's confidence and to open wide the opportunities for the public to participate in a meaningful way in the decisions of government, that the Committee has included

in the proposed legislation various steps to arrive at this goal.

• • •

[The] Fifth [Step] Committee has incorporated into this legislation this section (505) specifically dealing with citizen suits."

2 Legislative History 819.

B. THE STANDARD OF PROOF AS APPLIED BY THE TRIAL COURT AND AFFIRMED BY THE COURT OF APPEALS IS IN ACCORDANCE WITH APPLICABLE LAW.

Petitioners claim that the standard of proof utilized by the Trial Court and affirmed by the Court of Appeals in this case is in conflict with prior decisions of this Court. Petitioners refer to the prior Supreme Court cases, *Missouri* v. *Illinois*, 180 US 208, 200 US 496 (1901, 1906); *New York* v. *New Jersey*, 256 US 296 (1921). Both of those cases involved controversies between states as sovereigns heard under the original jurisdiction of this Court. In recognition of the sovereign status of the States involved and because of the extraordinary nature of the action this Court applied the "clear and convincing" evidence standard of proof. *Ohio* v. *Wyandotte Chemical Corp.*, 401 US 493 (1971). However, in this Court's exercise of its original jurisdiction in interstate pollution cases where only the plaintiff was a sovereign state and the defendant was a private party, the "preponderance of the evidence" standard was applied. *Georgia* v. *Tennessee Copper*, 206 US 230 (1907).

Here the action was brought against a political subdivision of a state. Such political subdivisions are not "states" as used in 28 USC §1251(a)(1), *Illinois* v. *Milwaukee*, supra p. 7. On the other hand the cases cited by Petitioners and mentioned

above involve controversies between sovereign states. Thus the clear and convincing standard of proof required in those cases involving controversies between sovereign states is inapplicable here.

Petitioners claim that there is no evidence of specific algae or taste and odor problems related to Milwaukee's discharges.

Obviously, the record does not include proof that Lake Michigan is now in a eutrophic state. What it does show is that conditions demonstrating the existence of "accelerated or cultural eutrophication" are present. Included in these conditions is the fact of excessive phosphorus discharges by Petitioners (A. Pet. F-20). Further the record demonstrates numerous changes in types and quantities of biological organisms (T-3254) and increase in taste and odor problems in drinking water in waters that are already eutrophic (T-3279). Under Petitioners' apparent theory, in order to garner the empirical and demonstrative evidence to prove a nuisance Respondents would be obliged to wait until the lake had suffered severe and perhaps irreparable pollution, i.e. eutrophication. With evidence then available Petitioners might be willing to cease their discharges. Clearly such specious reasoning must fall of its own weight. The Courts below had before them numerous actual studies at various locations in the Great Lakes and other bodies of water showing changes in the water related to nutrient inputs. (A. Pet. B-26). The record also clearly showed that Milwaukee was the source of over 1,000,000 pounds of phosphorus input into Lake Michigan each year (T-12929). Petitioners' argument that Respondents relied only upon theories is inaccurate.

Petitioners set forth the proposition that the trial Court improperly considered the highly technical matters presented in this lawsuit. Instead, Petitioners would have had the Trial Court defer to the "expertise of the administrative body set

up by Congress to deal with this subject", i.e., the United States Environmental Protection Agency (USEPA). Yet interestingly enough, at no point during the pendency of this action did this "expert administrative body" take an active role in presenting their position or expertise to the Court.

CONCLUSION

Your Respondent, State of Michigan, respectfully requests that this Court affirm the decision of the Court below.

Respectfully submitted,

FRANK J. KELLEY
Attorney General for the
State of Michigan

Robert A. Derengoski
Solicitor General

Stewart H. Freeman
Assistant Attorney General

Thomas J. Emery /s/
Thomas J. Emery
Assistant Attorney General

Attorneys for Respondent
State of Michigan

Business Address:
525 West Ottawa
Lansing, MI 48913
(517) 373-1124

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